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In the Supreme Court of the United States

OCTOBER TERM, 1965

BERTRAND A. O. TYSON, M.D.,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA IN THE NINETEENTH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, LOUISIANA

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STATEMENT OF THE CASE

The transcript of the trial in this matter, which is composed of the testimony of two (2) state witnesses, the defense did not call any witnesses, does not contain any evidence, directly or indirectly, indicating that petitioner herein was an active leader in protest against discrimination in 1963 and 1964 and engaged in efforts to abolish restrictions on the rights of Negro people to vote and enjoy other benefits of citizenship as contained in the first paragraph of petitioner's statement in his application for writs. (See Page 4, Petition for Writ of Certiorari filed in this Court.) The reason that no such evidence exists in this record is because such evidence from the State's view point would be alien to the issue of the trial. Although this

first paragraph in petitioner's "statement" contained at Page 4 of his application for writs herein, is not substantiated by this record in the trial court, its presence therein is readily appreciated from a reading of "Reasons Why This Court Should Grant The Writ", contained at Pages 6 and 7 of petitioner's application for Writs of Certiorari herein. A simple answer to the discourse contained under the heading of "Reasons Why This Court Should Grant The Writ", contained at Pages 6 and 7 of petitioner's application for Writs of Certiorari herein, is that the trial court record herein is completely devoid of any evidence whatsoever to support the contentions that it makes. This transcript in the trial court, which is contained in petitioner's petition for Writ of Certiorari herein at Page 100 through Page 157, simply reflects that on November 20, 1965 petitioner rented an automobile from Avis Rent-A-Car for a period of three (3) days, or until November 23, 1964. (See transcript Page 132, Petitioner's Petition for Writ of Certiorari to the Louisiana Supreme Court). The automobile was not returned when it was suppose to have been returned, that is on November 23, 1964. Mr. Roy B. Bowers, the Manager and President of the Gulf Shores Leasing Corporation, which has the Avis Rent-A-Car franchise in the Baton Rouge area, on several occasions called petitioner, although Mr. Bowers did not recall the exact dates of all the calls. He did make a note of a follow-up call on January 4, 1965, at which time Mr. Bowers stated petitioner definitely promised to return the car on January 8, 1965. When the car was not re-

turned on January 8, 1965 Mr. Bowers called again, and after several telephone calls, Mr. Bowers finally did reach or contact petitioner on January 15, 1965 and told petitioner that the car must be returned and that if he did not return it on the next day, that is January 16, 1965, that he, Mr. Bowers, would swear out a warrant to have the car returned. (See transcript Pages 120 and 121). Some three (3) days after this conversation, that is on January 18, 1965, Mr. Bowers did swear out a warrant against petitioner. Mr. Bowers testified that petitioner put up a Fifty and 00/100 ($50.00) Dollar deposit which covered a rental of this automobile for a period of three (3) days. The car was to be returned within three (3) days, and it was so stated on the contract, and that if he, petitioner, desired to keep the car longer, he must have asked permission to do so. (See transcript Pages 132 and 133). The car was finally returned on January 21, 1965, (See transcript Page 120), and at that time payment by check was made. The check was not honored by the bank and final payment in cash was received on January 26 or 27 of 1965. Mr. Bowers stated that he did not agree to the extension of the possession and use of this automobile by petitioner. That upon calling petitioner to return the car, petitioner would say that he would return it on a certain date, whereupon Mr. Bowers said or informed him to be sure that he did.

ARGUMENT

Petitioner acknowledges that he lacked verbal permission to remain in possession of the car. (See Page 7, Petition for Writ of Certiorari to this Court).

(Also transcript Pages 147 and 149). He certainly did not have written permission to remain in possession of same. (See transcript Page 86A). It therefore necessarily follows, having neither verbal nor written permission or authority to use this automobile, that he was in violation of the offense charged. Petitioner relies upon several articles of the Civil Code of Louisiana with reference to the subject matter of lease in an effort to justify his conduct herein as being legal. He cites Article 1817 of the Civil Code of Louisiana with reference to silence and inaction. The record in this case does not contain a situation calling for the application of Article 1817. As previously stated, this written rental of this automobile was for a period of three (3) days. After this time had transpired and the automobile had not been returned, Mr. Bowers, the President of the rental agency from which the automobile was rented, on numerous occasions, through telephone calls, attempted to get petitioner to return the automobile, all to no avail until after the charges herein had been filed. Petitioner furthermore relies upon Civil Code Article 2686, which provides for a situation relative to a lease agreement where no time for its duration has been agreed upon. The case at bar readily shows the inapplicability of this cited article. As previously stated, the time fixed in the contract herein was a period of three (3) days. Since the Civil Code articles cited by petitioner herein are inapplicable to the case at bar, and since petitioner agrees that neither verbal nor written consent or permission to remain in possession of the car existed herein, there is nothing

contained in this record to justify the possession of said vehicle by petitioner. There is nothing inconsistent or confusing from the articles of the Civil Code cited by petitioner herein and L. S. A.-R. S. 14:68 dealing with the offense of unauthorized use of a movable. This is simply a case whereby petitioner was rented an automobile for a three (3) day period, and a deposit to cover said period was obtained from him at the time of the rental. After the automobile was not returned at the termination of the three (3) day period, the Manager of the rental agency made innumerable telephone calls demanding the return of the vehicle and finally resorted to the filing of a criminal charge against him. Thus it cannot be said by any stretch of the imagination, that petitioner's use of that car was lawful and sanctioned by the Civil laws of Louisiana. Petitioner avers that this prosecution can only be explained as a "planned prosecutorial abuse" of a state criminal statute. There is no support for such an irresponsible statement as this record will reveal.

Petitioner further contends that there are two (2) constitutional objections in the case at bar; first, that a person cannot possibly be expected to be aware of the kind of conduct made criminal by the provisions of the criminal statute in that the criminal statute does not define "consent", and that other provisions of Louisiana law permits the behavior herein sought or herein made criminal. He further contends that under the terms of a statute otherwise clear, a Court may not by retroactive judicial construction make the statute apply to conduct not found within the terms of the

statute in the absent of judicial construction. L. S. A.-R. S. 14:68 forbids the intentional taking of any movable which belongs to another, either without the others consent or by means of fraudulent conduct, practices or representations but without any intention to deprive the other of the movable permanently, or the intentional use of any movable which belongs to another, either without the other's consent or by means of fraudulent conduct, practices or representations but without any intention to deprive the other of the movable permanently. The statute defines the crime disjunctionally, that is, it may be violated in two (2) ways, namely, either by the wrongful taking of the movable or by the wrongful use of the movable. L. S. A.-R. S. 14:3 provides:

> 14.3 Interpretation
>
> "The articles of this Code cannot be extended by analogy so as to create crimes not provided for herein; however, in order to promote justice and to effect the objects of the law, all of its provisions shall be given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision."

When this rule of construction is applied to R. S. 14:68 it is apparently clear that the Legislature in adopting this statute intended to denounce as a crime under the caption "Unauthorized Use of Movables", either the intentional taking of the movable or the intentional use of the movable, and if the defendant did

either without the consent or permission of the owner thereof, he is guilty of committing the offense. There is nothing vague about the statute in question. It defines the offense so specifically and accurately that any reader having ordinary intelligence will know when or whether his conduct is on the one side or the other side of the borderline between that which is and that which is not denounced as an offense against the law. *State v. Christine*, 239 La. 259, 118 So. 2nd 403; *State v. Kraft*, 214 La. 351, 37 So. 2nd 815. The statute meets successfully the constitutional test of due process because it gives notice of what act it accomplishes and it provides the offender with a sufficiently definite standard of guilt to avoid conviction on an ad hoc basis. Men of common intelligence are not called upon by the statute to guess or speculate at its meaning or application. The law does not require the victim to decide when the offender is intentionally using the movable without his consent. It tells the offender when he has violated its provisions regardless of the attitude of the victim. *State v. Hightower*, 238 La. 876, 116 So. 2nd 699; *State v. Morris*, 233 La. 388, 96 So. 2nd 643.

Although it is true that this offense requires a general criminal intent, intent is a question of fact, although it need not be proven as a fact, it may be infer from the circumstances of the transaction. L. S. A.-R. S. 15:445. *State v. Garner*, 1961, 241 La. 275, 128 So. 2nd 655. In the case at bar there is much evidence from which a general criminal intent can be inferred upon the part of petitioner to show that he intentionally used, without authority of the owner, the property in

question. Petitioner was repeatedly called after the three (3) day period had transpired to return the car and finally informed charges would be filed against him if the car was not returned, whereupon he told Mr. Bowers to "go ahead" and did not return the car within the time designated by the owner thereof.

A reading of this transcript will readily reveal that there is much evidence upon which this verdict is based.

Petitioner contends that he was "singled out" for the enforcement of this statute due to his historic activities as a leader in the efforts of his community to obtain full and equal enjoyment of the rights of citizenship. As previously stated, there is absolutely nothing in this record, other than petitioner's contention, unsupported by evidence, to support the foregoing statement. As a matter of fact, the record will show that after numerous unsuccessful attempts on the part of Mr. Bowers to regain the possession of his vehicle after the stated three (3) day rental period, that he, Mr. Bowers, came to the District Attorney's office and swore out a warrant for his arrest. (See Transcript Page 121 of petitioner's Petition for Writ of Certiorari). If the words "singled out" must be used, it might be pointed out that petitioner was "singled out" by the complaining witness herein, the President of the rental car agency, Mr. Bowers, simply because he had Mr. Bowers' vehicle beyond the rented term and would not return same. He was thus "singled out" for the foregoing reason by Mr. Bowers and not because of any alleged historic activities as a leader in the efforts

of his community to obtain full and equal enjoyment of rights of citizenship. It may be noted herein that although petitioner claims in his statement that he was active in protest against discrimination in 1963 and 1964 in efforts to abolish restrictions on the rights of Negro people to vote and enjoy other benefits of citizenship, that he had no trouble, and that there was no discrimination whatsoever, with reference to his leasing or renting of this vehicle.

Petitioner further contends that L. S. A.-R. S. 14:68 was not meant to apply to the facts of this case. He alleges he was "singled out" and that this was deliberately based upon an unjustifable standard of race. There is, of course, nothing in the record to support this. As previously stated, the elements of the offense of unauthorized use of a movable is the use of a movable without the consent of the owner and without an intent to permanently deprive the owner of same. This record will show that petitioner used this automobile, a movable, without the consent and against the known wishes of the President of this rental agency. Due process requires, among other things, that there be some evidence to support the verdict. If that test be met, and it is submitted that the record clearly shows that it has been met herein, then the constitutional sufficiency of construction must be presumed. It might be noted herein with reference to these unsupported contentions with reference to the use of state criminal process to discourage and harass those engaged protest and other activities, that at the time petitioner was arrested, charged and tried, that he was not actively

engaged in such conduct and that this charge and arrest did not grow out of any such conduct, but as the record clearly reflects, grew out of conduct wherein this petitioner would not return an automobile which he rented after the expiration of the rental period, even in view of repeated persistant demand to return same by the owner thereof.

CONCLUSION

It is respectfully submitted that the application for Writ of Certiorari to the Supreme Court of Louisiana be denied because this is not a case where the State of Louisiana has decided a federal question of substance not heretofore determined by this Court or has decided it in a way probably not in accord with applicable decisions of this Court as required by Rule 19, Paragraph 1, Sub-section A of this Honorable Court's rules. Also, this application should be denied because certiorari will not lie to review questions of fact. 14 Corpus Juris Secundum Section 22E. The foregoing rule, of course, is subject to the limitation that in certiorari evidence may be reviewed only for the purpose of ascertaining whether the Lower Court's findings are supported by any evidence, or whether its findings are clearly against the evidence. 14 Corpus Juris Secundum Section 1722. The scope of review under the Writ of Certiorari is confined to the record and certiorari will not lie for the purpose of reviewing defects not appearing on the face of the record. 14 Corpus Juris Secundum, Section 34.

For the foregoing reasons, it is respectfully submitted that the application herein should be denied.

Respectfully submitted,

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